UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

No. 1:14-cv-10943-WGY

GEORGE J. VENDURA, JR.,
Plaintiff

vs.

JONATHAN BOXER, et al,
Defendants

****

For Hearing Before:
Judge William G. Young

Case-stated Hearing

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
Thursday, May 28, 2015

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A P P E A R A N C E S

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P R O C E E D I N G S

(Begins, 9:05 a.m.)

THE CLERK: Now hearing Civil Matter 14-10943, Vendura versus Boxer, et al.

THE COURT: Good morning. And would counsel identify themselves and who they represent.

MR. ROSENBERG: Good morning, your Honor, Stephen Rosenberg for the plaintiff, George Vendura.

MR. MYLER: Sam Myler on behalf of the defendants.

THE COURT: Very well.

Let me simply rehearse the procedural history so we are all in agreement. The Court is prepared to hear this matter as a case-stated. The parties agree that the record is before the Court and the Court may draw reasonable inferences from the record as it is before the Court. In essence then this is the final argument upon a submitted record, and I will give the parties the normal one half hour, though I don't invite one half hour per side, for final argument.

So agreed for the plaintiff, Vendura?

MR. ROSENBERG: Yes, your Honor.

THE COURT: And for the defense?

MR. MYLER: That's agreed, your Honor.

THE COURT: All right.

This is the -- I follow the Massachusetts

procedure where the plaintiff does bear the burden of proof, so we'll let the plaintiff argue last and we'll hear first from the defense.

MR. MYLER: Your Honor, very briefly one procedural question regarding this case-stated hearing.

THE COURT: Yes.

MR. MYLER: If the defense argues first, I assume that that means the defense can reserve time for a reply or a written --

THE COURT: No, it does not. It's one half hour a side. But I do want the procedure clear.

The great likelihood is that I'm going to take this under advisement. I'm prepared for argument. I'm familiar with the case. But this is not one where I'm going to grant -- my duty now is to make findings and rulings, although the findings are on a stipulated record. So you're entitled to an opinion. I'm not prepared to give one from the bench. I didn't come out here with that in mind. And therefore, if after argument you want to submit further briefing, I will entertain it simply because I am happy to get all the help I can. But I do not require it.

So it's one half hour a side. The plaintiff goes last. I'll hear from the defense.

MR. MYLER: I appreciate that, your Honor. Thank

you.

So as I mentioned, my name is Sam Myler and I'm here on behalf of the defendant.

It's the defendant's position that this is a relatively simple ERISA Section 502(a)(1)(B) case and that the Court should affirm the plan administrator's decision to deny plaintiff's 20 years of benefit service under the plan and a lump sum benefit payment.

My argument for this position essentially has three parts, your Honor. The first is just identifying and kind of pinning down the standard of review. There was some dispute between the parties in the briefing with respect to the standard of review. The second part of the argument is just an overview of the plan administrator's initial decision and an explanation as to why that decision was reasonable. And then finally I will address the various arguments offered by the plaintiff, um, for why the plan administrator's decision was incorrect.

So with respect to the first part, the standard of review, as the Court's well aware -- the Court is sitting in essentially the position of an appellate tribunal, um, and its task is simply to review the plan administrator's decision, but that, however, begs the question as to what the standard of review is of the

plan administrator's decision.

The Supreme Court, over 25 years ago, in the ***Firestone*** case, said the default standard in this type of ERISA case is going to be a de novo standard, however they came out in that case and they said that the standard is an abuse of discretion standard if the plan sponsor or the employer simply provides as such in the plan. Here we have a plan where the plan sponsor, Northrop Grumman, has clearly vested the plan administrator with the discretionary authority to not only decide claims but to also interpret the plan.

The discretionary language says that the plan administrator has the sole and exclusive authority to interpret the plan, decide claims, resolve any factual disputes that may arise, and plaintiffs don't dispute that this language that's set forth in the plan is sufficient in general to confer adequate discretion on a plan administrator, however they make a few arguments that in this case, under these specific facts, there is something, there's some sort of less deferential standard or the deferential standard doesn't apply.

THE COURT: Because they are the ones who make the determination, but they're also on the hook for paying the benefits?

MR. MYLER: Well, your Honor, I don't believe that

that was the thrust of plaintiff's argument. They do note in a footnote that there is some sort of structural conflict of interest, I believe it was in a footnote in their opening brief, but I don't see them having developed that argument at all.

The fact that they're -- well, to be clear the person on the hook for paying the benefit is a trust. Northrop Grumman has put that money into the trust. The trust is administered by a committee. Now that committee admittedly is comprised of individuals who were appointed by Northrop Grumman, but the law is clear that that does not, in and of itself, create some insurmountable conflict, the committee members understand and under ERISA they had an obligation to administer this trust and decide claims consistent with their fiduciary duty and when they're doing that they're acting as fiduciaries for the plaintiff and for all the plan participants and then they have their obligations for Northrop Grumman.

THE COURT: And your position is that this is not a surprising arrangement, it's a routine arrangement, and the abuse of a fiduciary's discretion is the test.

MR. MYLER: Exactly.

THE COURT: Fiduciaries are held to the highest -- what's the language in the cases, "a punctilio of

fidelity and the like"?

MR. MYLER: Exactly.

THE COURT: But having said that, unless they fail in that, the Court is expected to view their actions under an abuse-of-discretion standard.

MR. MYLER: I would -- generally I would say that is correct, your Honor. I would make one clarification. The point with respect to their fiduciary duties -- those fiduciary duties are only really implicated when there is a breach-of-fiduciary-duty claim, not simply a determination as to whether an individual is entitled to benefits. When they're making a determination as to whether someone's entitled to benefits, they don't have to decide the issue in a manner that is most, um, you know, that has the participant's best interest at heart, they're to decide that based simply on the terms of the plan.

Now, when it comes to making smart investment decisions with this pension trust fund or --

THE COURT: In other words, there's been some recent law on that, but this doesn't challenge their investment decisions?

MR. MYLER: Or any fiduciary matters.

THE COURT: This is -- I understand that this is a payment-of-benefits issue. I understand that.

MR. MYLER: Exactly, essentially a breach of that.

THE COURT: Did he get any other compensation for his patents other than these long-term disability payments?

MR. MYLER: That is something that I can't answer. There's no indication based on the administrative record. And obviously we're limited to this that there was some sort of compensation for these patent awards. I don't know what patents there were or if there was some sort of award at any point. I would say plaintiff hasn't raised it, you know hasn't submitted any evidence that there were such payments or that those payments are necessarily material.

So the plaintiff offers a couple of arguments as to why the standard of review shouldn't be abuse of discretion, one of which is that this involved the interpretation of some -- of an extra plan document, specifically the settlement agreement entered into in 2003. The plaintiff's position that simply interpreting this extra plan document renders the entire claims procedure subject to de novo review and that's simply not the case, your Honor. If that were true then the plaintiffs or participants could submit any sort of irrelevant miscellaneous document and argue that they're entitled to benefits under it and -- and claim that the

entire administrative procedure is subject to de novo review.

THE COURT: When you say that that's not the case, what you mean is that's not the law?

MR. MYLER: That's not the law.

THE COURT: All right.

MR. MYLER: And it can't be the law. It would make no sense.

The plan also argues that there was an ineffective delegation of authority to someone other than the plan administrator to decide this claim. While there's some law to support the fact that if you -- if someone other than the plan administrator decides a claim, in order for that person to be availed of the abuse of discretion standard there needs to be an effective delegation. The problem with this argument is that the premise is incorrect, there is no delegation in this case. The appeal denial, the administrative appeal denial, was decided by the Northrop Grumman administrative committee who under the plan is identified as the plan administrator and it was presented, the plan, through the secretary for the committee. Now, the plaintiff doesn't really identify who other than the committee decided the claim, it may be that they're taking the position that the secretary decided the claim, but the

final appeal denial letter, if we were to take a look at it, makes clear that the committee decided the claim, the secretary for the committee was just the spokesperson or the mouthpiece, and the committee obviously can't speak for itself, it needs to appoint someone to speak on its behalf.

So just to be clear, your Honor, it's the defendants' position, and this wraps up the first part of my argument, that the abuse-of-discretion standard does apply in this case, it applies to the plan administrator's interpretation of the plan, and therefore it's the plaintiff's burden to establish that not only was this -- it was the plaintiff's burden to establish not only was their interpretation of the finding correct, but that it was -- that it stretched beyond the bounds of reasonableness. It's not enough to obviously offer a competing interpretation and the plan administrator's decision doesn't need to be the best decision. So then I'd just like to give a brief overview of the plan administrator's decision, and this is the second part of my argument.

This case is, as your Honor I'm sure is aware, is all about the interpretation of the plan provisions related to the accrual of benefit service under Northrop's pension plan. Obviously the accrual benefit

service is important because it's part of the formula for calculating the amount of pension, the more benefit service you're able to accrue over the course of employment, the higher your monthly pension's going to be.

There's this related issue as to the lump sum but the plaintiff had -- the plaintiff does not dispute that, that necessarily follows the benefit service question. Therefore, if plaintiff was not approving benefit service up until 2013 when he submitted his request for the lump sum, he's not entitled, under the plan administrator's interpretation, to this lump sum. So it necessarily kind of follows this question as to the benefit service.

So when the plaintiff -- so in order to determine benefit service, this is set forth in -- and if you give me a moment, I'll turn to it, um, in Section 2.02 of the plan, and under this section this is essentially the war and everyone in it revolves around the interpretation of this section.

So under this section it provides that a participant's benefit service is equal to the number of months in which they satisfy one of the conditions set forth in its subparts. It had seven subparts. One, for example, (A) is the receipt of compensation from the

control group for the performance of services. This is the traditional idea of work, that if an individual is working they're accruing benefit service.

In 2013 when the plaintiff retired, he submitted his application for a pension and the plan administrator looked and looked at his employment history and made the following determination. She decided that -- she found that between 1993 and 2000 the plaintiff worked for a predecessor to Northrop Grumman Corporation, TRW, Incorporated, and so during that 7-year period he was actively working. In June of 2000 he began a period of long-term disability and he went out on a long-term disability, was receiving long-term disability benefits, and that period continued all the way up until 2013. When those benefits were exhausted in 2013, he submitted his application for a pension.

Based on this employment history the plan administrator added up benefit service and she found that under Subpart (A), for the period between 1993 and 2000, the plaintiff was obviously entitled to benefit service, there was really no question there. In 2000, however, he begins this period of 13 years on long-term disability.

The plan administrator looks to Subpart (C) of this Section 2.02 and finds that, yes, individuals are

able to obtain benefit service while on long-term disability, however if this period of long-term disability begins after January 1, 2000, there's a 60-month maximum on the accrual. So an individual who is out on long-term disability indefinitely, 10, 15, 20, 30 years, could only get 60 months or 5 years if that period of leave began after January 1, 2000. Plaintiff's period of leave began in June of 2000, that's not disputed by plaintiff. Accordingly the plan administrator applied this 60-month limitation. So she has awarded him an extra 5 years from June of 2002 to June of 2005 and after that he wasn't accruing benefit service anymore. Well, that's the plan administrator's decision in a nutshell. And it's relatively simple given the complexity of this claim.

THE COURT: Well, how does this settlement figure in here?

MR. MYLER: Which leads to my third part, and things got a little more complicated.

Plaintiff submits an administrative claim under the plan, which ERISA requires the plan to include, and the first argument he raises to the plan administrator is that "That's all well and good about Section 2.02 and the 60-month limitation, but none of that applies to me because I am governed by this superseding and

extraordinary settlement agreement." The plan administrator looks at the settlement agreement and correctly determines that the settlement agreement's completely irrelevant, and that's a decision that we're hoping the Court will affirm.

If you look at the settlement agreement, there's nothing out on the face of it that states "The plaintiff shall continue to accrue benefit service during all periods of long-term disability." In fact it expressly states that the plaintiff's benefits, to the extent he's entitled to them, shall just simply be determined by the benefit plans of which he is a participant, and it simply defers to the benefit plans. It also states that for a period prior to 2000 he'll be awarded benefit service while he was on medical leave, but didn't say anything about benefit service going forward, and obviously they have contemplated the idea of plaintiff's benefits or addressed it with respect to past periods of leave, but didn't say anything about going forward, simply deferred to the plan. And so there's nothing on the face of the settlement agreement to suggest that the plaintiff has a special situation or should be exempt from article -- or Section 2.02.

THE COURT: Help me out. What was -- I just want you to rehearse it for me again.

How did this settlement agreement come about, what was being settled there?

MR. MYLER: That is a very good question. You see we're restricted to the administrative record.

THE COURT: We are, we are, and yet -- all right, we're in the same ballpark. There's my question.

MR. MYLER: Yes. He -- so the plaintiff, in none of its claims, explains why this was a settlement conference. The agreement itself appears to relate to certain claims, um, related to his selection for layoff, um, while TRW owned the company. So there seems -- there appears to have been some sort of a dispute as to why he was selected for layoff, whether it was discriminatory, or what the reasons were, and this was a settlement of that.

THE COURT: It -- let me see if you'll agree to this much.

From the record before me it would be a reasonable inference that objecting to the TRW layoff, on various civil rights grounds, age, disability, some civil rights grounds, he entered into a settlement agreement. We have it. We know what it says.

And you'd agree with that?

MR. MYLER: Yes, he entered into a settlement agreement.

THE COURT: And I'm not trying to pressure you.

MR. MYLER: Yes.

THE COURT: So now if that's a reasonable inference here, um, we have a settlement agreement and we have the, um, ERISA decision, and your position is that the -- that both are valid but neither one is in conflict with the other?

THE COURT: Exactly, your Honor. There's nothing incompatible about the two. Individuals at companies can settle all sorts of claims, it doesn't necessarily mean they have any sort of relationship to benefit plans. And that's not necessarily to say they couldn't, it's possible that they would, but there would be issues about whether that person had authority to modify the benefit plans for a certain individual, et cetera. But here there's just really no conflict in the first place. Only if he tries to create one, um, through essentially what is the second part of my argument with respect to the settlement agreement, and that is that there was some sort of implication through the settlement agreement that his benefits would continue based on the fact that it provided that he would remain at some sort of employee, some sort of nominal employee. But the plan administrator --

THE COURT: Well, in fact his benefits did

continue, it -- your point is that after the 5 years that just doesn't count toward time in service?

MR. MYLER: Exactly, your Honor.

THE COURT: Which is your marker for determining the -- whether it's a lump sum or a payout over time, that's the marker for the amount of the retirement benefit?

MR. MYLER: Yes, and so the benefit service is used to calculate the amount of the pension benefit. And it also has kind of a subimportance, I suppose I should say, in that to get a lump sum you need to be accruing benefit service at the time you applied for the lump sum. So it not only calculates the amount of your pension, but you need to be getting benefit service when you apply for the lump sum under the plan to get the lump sum. So -- but to be clear, his benefit service was not accruing under the settlement agreement between 2000 and 2005, it was accruing under the terms of the plan. The only benefits he was getting was --

THE COURT: Well, the settlement agreement says those benefits shall continue.

MR. MYLER: The settlement agreement -- I don't believe the settlement agreement says his benefits shall continue, um, it simply says that he shall remain an employee until his long-term disability benefits are

exhausted or one of five other conditions occur. The settlement agreement is essentially -- I'm not entirely sure what the goal was here, it appears to defendants that the goal was to allow him to continue as a technical or nominal employee so that he can continue to obtain long-term disability benefits.

THE COURT: 5 more minutes, just for your own planning.

MR. MYLER: Oh, I apologize.

So that's the argument with respect to the settlement agreement. The plan administrator also determined that his employment status is irrelevant under the plan and that's essentially one of maybe four conditions that needs to be met. And even if he's an employee, that's a necessary condition, but it's clearly not sufficient. And, um, so that's the argument with respect to the settlement agreement.

The other argument that plaintiff raised kind of after the settlement agreement is that he's entitled to benefit service under this other subpart which relates to worker's compensation. So he submitted an amendment to his initial administrative claim and he said, "Oh, well, I'm also entitled to continue benefit service because under Subpart (B) I'm absent from work due to a workplace injury and I have received -- I'm receiving

worker's compensation benefits." The plan administrator said, "Yes, it's true that" -- not that he's receiving those things, but that "If you were to be receiving worker's comp, you could continue to accrue benefit service while you're on leave." But the plan administrator said that there's a provision here that says, "However, that service credit shall be limited to a maximum of 12 months unless the participant has met the eligibility requirements for receiving long-term disability benefits whether or not he actually received such benefits."

So she essentially said, "Well, yeah, even if you were getting service under this subpart, it doesn't matter because you already got the 5 years under the long-term disability, this 12 months isn't going to do anything for you, it's kind of superseded by this 5 years you were getting under (C)."

The plaintiff argues that this limitation -- this 12-month limitation doesn't apply because he was obtaining long-term disability benefits. This could be no other -- the only way to characterize this is as somehow trying to create a loophole between the two provisions. Under (B) you get worker's comp up to 12 months -- if you're getting worker's comp, you get up to 12 months of benefit service. Under (C), if you're

getting long-term disability, you get up to 60 months benefit service. And there's no reason why if you're obtaining worker's comp but are eligible for long-term disability, that all of a sudden you should have no limitation at all. And the plan administrator determined that that interpretation or that issue was -- or that argument was just simply unreasonable, an unreasonable interpretation of the plan. And it's the defendants' position that plaintiff hasn't carried their burden of showing you that that interpretation of the relationship between (B) and (C) was stretched beyond the bounds of reasonableness so as to require the Court to overturn the plan administrator's decision.

If you have no further questions, your Honor, that will be my argument.

THE COURT: Thank you, very much.

Mr. Rosenberg.

MR. ROSENBERG: Thank you, your Honor. It always happens to me where I change my argument while listening to the defense.

THE COURT: I wouldn't call that a fault, that's the argument that you're meeting.

MR. ROSENBERG: Thank you, your Honor.

As a result, I want to start with a couple of 30,000-foot issues. First of all, the standard of

review question.

The First Circuit has said, at least three times, that when the plan administrator is granted discretion but its determination relies on its legal determination of contracts or legal standards or statutes that are outside of the plan, discretion doesn't apply, and essentially the reasoning is that for the Court is as qualified, and certainly more so, and has as much power to interpret that as does the plan administrator.

The settlement agreement, your Honor --

THE COURT: So your point is not -- the way you meet his point that simply because this is an extraneous document, that's not what affects the standard of review, that what affects the standard of review here, in your view, is that it's a contract to be interpreted, that's what courts do all the time, and I should do what I always do, um, use normal contract interpretation, match that against what the plan administrator did here.

Have I got your argument?

MR. ROSENBERG: That's exactly right, your Honor, it's a substantial legal interpretation issue that belongs to the court.

THE COURT: Without adopting it, I do understand that argument.

Go ahead.

MR. ROSENBERG: So that's the primary reason why arbitrary and capricious review doesn't apply here.

Now, the settlement agreement, as the Court touched upon, is actually an agreement entered into by the plan sponsor with the plaintiff, it specifically references the benefit plan, talks about how it will be integrated, says that in the place of a conflict, the agreement will govern. So this is clearly deliberately tied by the plan sponsor to the plan, it's central to any interpretation they can make here, and thus that rule places it within de novo review.

Separately I simply want to point out that even if arbitrary and capricious review did apply, the defendants are making the same argument that defendants always make, which is "As long as we're reasonable, that's good enough," but likewise when you're talking about plan interpretation the First Circuit has made clear that's not the standard, you don't win just because you're reasonable, under all the facts and circumstances you still have to be tied to the language and it still has to be an accurate interpretation of the plan language, and that follows naturally from ERISA itself which obligates the fiduciaries and the plan administrators to apply the terms of the plan. And so what we'll see when we talk about these plan terms is

that their arguments and their interpretation don't actually fit the terms. So for that reason, even if it was an arbitrary and capricious standard --

THE COURT: You're in agreement though that the key language is this section, 2.02?

MR. ROSENBERG: The key language is 2.02, and in particular 2.02(b), which really controls here.

Now, initially again from a 30,000-foot view, let me talk briefly about the settlement agreement. The settlement agreement expressly provided that he would remain an employee and it doesn't say you're an employee just for LTD purposes or anything else, Mr. Vendura engaged the company when they sought to lay him off and forced him to settle with him. They paid him almost a quarter of a million dollars. This wasn't just some token, "Let's get rid of the guy, let him stay on LTD" settlement, it contains express terms that when negotiated they say, "You'll treat me as an employee for all purposes," and the settlement agreement says he is entitled to all benefits as though he is an employee, and if there's a conflict between the plan's terms and the settlement agreement, the settlement agreement controls it.

Now, what's important about this is that their interpretation of Article 2.02, one of the ways you

accrue benefit services is essentially as an employee. That's really what 2.02(a) is "receipt of compensation from the control group for the performance of services." That's the plan's way of describing an employee. It's common sense that obviously if you're still an employee, you're accruing service while you're working there, and the plan needs some ERISA lawyer's terminology for saying that and that's what 2.02(a) is.

So the plan itself clearly provides that if you're an employee, you're accruing benefit service while you're an employee. The settlement agreement is written specifically to say "You're an employee."

As we laid out in our briefing, there are a number of events and documents in which they continue to treat him as an employee and in fact in 2008 they tried to terminate him again. He objects, says "My settlement agreement says I'm an employee." They consult with their lawyers and they expressly say in a letter they write back to him, "We've discussed it with our lawyers and based on a legal opinion of your settlement agreement, you remain an employee."

THE COURT: This is all in the record?

MR. ROSENBERG: It's all in the record, your Honor. And in fact that specific letter, just so the Court knows, can be found in the administrative record

at NG 000441. "Legal counsel has confirmed that you do not have to retire by October 1, 2008, you will remain an active employee on long-term disability and this is due to your settlement agreement dated 7-11-03." And so the settlement agreement and their own subsequent interpretations of it treat him always as an employee until he tries to retire in 2013.

To the extent that this settlement agreement, rather that the plan, has some sort of language that they construe as not allowing him to accrue service time as an employee, the documents are in conflict and the plan sponsor agreement in the settlement agreement, the settlement agreement controls that dispute, he's an employee.

So that even if we move beyond that, the key issue here becomes Article 2, Section 2.02(b) because that controls the question of if the settlement agreement didn't exist at all, would he be entitled to continue to accrue benefit service until his LTD expired and he sought to retire in April of 2013?

THE COURT: Let me make sure I follow. As I'm following your argument you're now on an alternative fallback argument. You've made your argument that he's an employee, he gets all the benefits of an employee, the settlement agreement says so and the settlement

agreement, written in light of the plan, um, references the plan and is superior in these circumstances. That's what you've argued?

MR. ROSENBERG: That's the first argument.

THE COURT: That's right. And if the Court accepts that argument, reading the papers, um -- you know, if the language says that, then it would not be open to a plan administrator simply to ignore that language and that's what you say is going on here.

MR. ROSENBERG: Yes, your Honor.

THE COURT: Okay. Having made that argument, which I understand, now you're falling back and saying, "Suppose there was no settlement agreement," and I'll hear you.

MR. ROSENBERG: Thank you, your Honor. That's exactly right.

Article 2.02(b) -- Article 2.02 says you accrue benefit service during any month in which any of the following events occur. So they rely on a Section (C), I believe it is, in which you get 5 years of benefit service while out on LTD. But the plan says, in Section 2.02, you receive the service time during any time in which any of the provisions are triggered, not just the one they relied on, and they knew that he was raising the worker's comp provision, 2.02(b), they addressed it

in their denial letters.

2.02(b) says you accrue service time while you're absent without pay from work because of injury or occupational disease received in the course of his employment. There's no dispute and it's established in the administrative record. In fact they reference it in their reply brief to this court that he suffered workplace injuries in 1994 and 1995, at least two of them, one was a car accident, another was a cardiac arrest. So that piece is satisfied. And for which he receives worker's compensation disability benefits.

Now, he received worker's compensation disability benefits for those incidents. You will not find it in the administrative record, and I'll tell you why in a moment, but he received monthly worker's compensation checks in '95, '96, and maybe '97, he continued to receive worker's comp medical care for years afterwards --

THE COURT: But you're saying I'm not going to find this in the record?

MR. ROSENBERG: And I'm just going to give you a little background, I'm going to tell you why you won't. And then at some point he lumped-summed it for $400,000 or 500,000. He can't recall after taxes how it worked out and filing it after paying legal fees. But in any

event, here's the reason it's not in the administrative record.

The Court, I'm sure, knows exactly how internally these appeals work, there's an initial submission of the claim, there's an initial denial, you're allowed to appeal, in fact you must appeal if you ever want to bring it to court, you appeal, they deny it again, and we end up in court.

In both their initial denial letter and their final denial letter they accept the premise that he was receiving worker's compensation benefits. He's raised it with them. They don't dispute it. In the final denial letter, for instance, at NG Triple 0, 392, they write, "You also began receiving worker's compensation benefits as a result of two workplace injuries sustained in 1994." They said the same thing in the initial denial letter, NG Triple 0, 243.

THE COURT: So your point is I can take them at their word?

MR. ROSENBERG: You can take them at their word, your Honor, but also, and it's in our brief, there's actually, from NG Triple 0, 544 through to NG Triple 0, 549, is something called "Exhibit A, Worker's Compensation Verification" received June 4th, 2013 from the Northrop Grumman, Corp. benefits department.

Mr. Vendura was not represented by counsel when he was pursuing these claims.

With regard to making out this worker's compensation issue, he submitted what he had. These are claims, they're worker's compensation claim forms, they're hearing forms, a notice of taking deposition and so forth for California's worker's compensation procedures. He submitted what he had. They never raised any dispute. They didn't say it in the initial denial letter, which would have allowed him to supplement it if they were going to dispute it, they didn't raise it in the final denial letter, they didn't investigate it themselves based on the administrative record, they just accepted it.

Glista, and this court's -- rather the First Circuit's decision earlier this year in ***Dutkewych,*** D-U-T-K-E-W-Y-C-H, ***vs. Standard Insurance Company***, 781 F.3d 623, all establish that you can't come up with a post hoc rationalization as a plan sponsor after the denial letter and after the administrative record is closed because you've already cut off the participant's opportunity to respond to your position and your objections. You can't raise a new position in court. It's essentially the same as going up on appeal. They're bound to the conclusion in those denial letters

that there was worker's compensation benefits.

Now, at different times they argue that, um, he had to have been receiving worker's compensation disability benefits during a given month, but it doesn't say that in the plan anyway, it just says "absence from work because of the injury received in the course of employment and for which he receives worker's compensation disability benefits." As long as you receive it, it doesn't matter when, then you've satisfied the plan.

They say that it's a loophole, that the plan administrator enforces it this way by avoiding it. There's no evidence the plan administrator has ever gotten this before or treated it this way. This is simply what they're saying. Now they may say, "We have discretion and it's reasonable," but even under arbitrary and capricious review and the cases we cite in the our brief, the First Circuit makes clear that you still are tied to the language. And there's one great case in which the First Circuit references, um, that you have to put aside skillful lawyering, that even if skillful lawyering can make night day, you still have to stick to the plan terms. That provision that they interpret it this way to avoid a loophole isn't written anywhere in here and there's no evidence they've ever

done it that way in the past anyway.

Further --

THE COURT: Well, is that last point demonstrated in the record?

MR. ROSENBERG: Actually it's demonstrated by the absence of it. They say --

THE COURT: Well, you say because they don't argue that "This has been our longstanding practice" and cite examples, that I'm to infer that this is the first time they've ever taken that position?

MR. ROSENBERG: I believe that's exactly right, I believe it is devoid of evidence that they've ever thought of this before.

THE COURT: I see.

MR. ROSENBERG: And I will point out that this provision isn't a loophole, it makes complete sense, that you would choose -- or at least it makes as much sense to believe, as a plan sponsor motivating tens and hundreds and possibly thousands of employees around the world, that you might favor an employee who's out on LTD because of a workplace injury over people who are out for other reasons, and that's all this provision does.

And so what about the time limit? Well, the time limit is in a second call, "Provided however that service credit shall be limited to a maximum of 12

months unless the participant has met the eligibility requirements for receiving long-term disability benefits." There's no dispute he met those requirements and he received long-term disability until 2013. So the time limit is gone. So factually on the administrative record he satisfies all of the provisions of 2.02(b) for accruing benefit service time the whole time that he's out and the only time limitation contained within it factually isn't applicable.

And that's basically our argument, your Honor.

THE COURT: I understand it and I thank you. This has been extremely helpful and as I indicated I would, I take the matter under advisement. Thank you.

(Ends, 10:00 a.m.)

C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the foregoing record is a true and accurate transcription of my stenographic notes before Judge William G. Young, on Thursday, May 28, 2015, to the best of my skill and ability.

/s/ Richard H. Romanow 06-04-15

RICHARD H. ROMANOW Date